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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

INSTITUTO LABORAL DE LA RAZA, Plaintiff and Respondent, v. CREDITORS TRADE ASSOCIATION, INC., Defendant and Appellant.	A155099 (San Francisco County Super. Ct. No. CGC-13-534096)

After some four-and-a-half years of litigation, which included numerous court-imposed and court-supervised settlement conferences, plaintiff and defendants entered into a six-page settlement agreement. Following its accusation that defendants breached the settlement agreement, plaintiff moved under Code of Civil Procedure section 664.6 (section 664.6) to enforce the settlement agreement, and defendants cross-moved for an order that they were in compliance. The trial court entered an order ruling for plaintiff, and defendants appeal, arguing that two aspects of the order exceeded the court's jurisdiction. We reject the argument, and we affirm.

BACKGROUND

The General Setting

Respondent is Instituto Laboral de la Raza (Instituto). Instituto assists indigent workers in Labor Commissioner proceedings, specifically in "Berman hearings," where the employee attempts to recover wages from his or her employer. (See Labor Code, § 98; *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946–947.) If the worker

is successful, he or she receives an award, which is then entered in a judgment in the appropriate superior court.

It is frequently the case that those judgments are difficult to enforce, for a variety of reasons, including, for example, that the judgment debtor may be a corporate entity that no longer exists, or has been abandoned, or has transferred its assets. Thus, the only way to collect the judgment is to add the name of the owner or the successor business as a judgment debtor, done through a post-judgment motion or even a new action to add the name of an "alter ego" or "successor." (See *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419.)

Instituto continues to assist the workers after the judgments to enforce them. And in this regard, Instituto from time to time enters into agreements with various attorneys and collection agencies to assist with collecting on the judgment.

One such agreement was in May 2005 with appellant Creditors Trade Association, dba Great Western Collection Bureau (CTA), an entity owned and operated by Gary Looney,[1] under which CTA would collect judgments obtained by the workers assisted by Instituto (the collection agreement). The collection agreement was signed by Sarah Shaker, executive director of Instituto, and Looney, president of CTA. Pursuant to the collection agreement, between 2005 and 2012 Instituto referred some 600 judgments to CTA for collection, which referrals would generally come about as follows:

Shaker would present CTA with a potential judgment for collection, on a standard form created by CTA, along with a " 'profile' " of information useful for collection; if CTA was interested, it would draft an " 'Assignment of Judgment' " and mail it to Shaker; Shaker would then talk to the worker about the collection agreement and ask the worker if he or she wanted to sign the assignment; and if the worker agreed and signed, Instituto would return the assignment to CTA.

[1] CTA was at some point succeeded by Collectronics, Inc. (Collectronics), which continued to do business under the name Great Western Collection Bureau.

CTA would then go about its efforts attempting to collect the judgment, and would maintain the account information in an electronic database, and would produce for Instituto " 'Inventory' " statements that would list all of the Instituto accounts that CTA was currently pursuing.

In 2012, Shaker was following up on a judgment in a case and heard that two years earlier the debtor had settled for $22,000. This was news to Shaker, and she confronted Looney about this. He gave what Shaker perceived to be a suspicious—if not downright untruthful—explanation.[2] This caused Shaker to ask about other accounts, the upshot of which was that by e-mail of December 26, 2012, Instituto informed CTA that its conduct was a breach of the collection agreement and demanded an accounting and a reassignment of all accounts. After several months, CTA agreed to reassign accounts it considered worthless, but refused to reassign accounts it believed were still collectible. CTA also refused to provide an accounting. This lawsuit followed.

The Proceedings Below

On September 9, 2013, Instituto filed a complaint, and almost three years later an amended complaint, naming as defendants CTA, Collectronics, and Looney (for convenience, collectively CTA). The register of actions for the case is 14-pages long, manifesting the various discovery motions and case management conferences involved. That register of actions also reveals that the case had several times been set for trial, resulting in numerous motions in limine to be filed on at least two occasions. It also shows that along the way there were at least three court-supervised settlement conferences, one of which lasted three days. The case had been assigned to no fewer than three judges for assignment for all purposes, finally to the Honorable Andrew Cheng, the judge who entered the order here. And the case was still pending in late 2017, more than

[2] At first, Looney denied there had been a collection. Later, he tried to claim there had been a collection of $20,000 but no settlement and that a check had been provided to Instituto. According to Shaker, CTA had actually received $22,028.94 in a settlement, and no check was sent. Looney also claimed CTA incurred substantial attorney fees, but this was, in Shaker's words, a "lie," as the claimed " 'attorney fees' " were based on a fake invoice and CTA's own staff time.

four years after it was filed. In short, the case had an unusual history, an unusualness perhaps best captured by this entry on April 19, 2017: "Removed from settlement conference calendar set for Apr-19-2017—by court. Matter did not settle after a three-day judicially supervised settlement conference. The court ordered an accounting, the terms & conditions of which were placed on the record by Douglas Provencher, attorney for defendant Creditors Trade Association, Inc., dba Great Western Collection Bureau. Matter remains set for court trial in Department 606 at 9:00 a.m. on May 1, 2017. . . ."

By order of July 21, 2017, the case was once again set for trial, this time for trial "on September 25, 2017 or January 3, 2018."

The Settlement Agreement—and Its Aftermath

On January 2, 2018, the parties entered into a settlement agreement. It was six-pages long and signed by Shaker, for Instituto, and by Looney, who signed for himself and the two entities, CTA and Collectronics. As relevant here, section three, subsection two of the settlement agreement, entitled "Termination of Agreement; Cooperation; and Additional Collections," provided as follows:

"a. The collection agreement between Instituto and CTA is terminated.

"b. CTA shall not retain any Instituto accounts. 'Instituto accounts' means any accounts, cases, or judgments that were assigned to CTA for collection by Instituto, or by Instituto clients, or subject to the terms of the agreement between CTA and Instituto.

"c. Within 60 days, Instituto shall provide and CTA shall within 20 days thereafter execute documents appropriate or necessary to return or re-assign any accounts, cases, or judgments arising from or related to Instituto accounts, back to the original judgment creditor or such other person as Instituto may direct.

"d. Instituto shall identify all accounts, cases, or judgments and create the documents as appropriate or necessary to accomplish the purposes of this agreement.

"e. CTA shall not receive any benefit or payment as a result of reassigning accounts or judgments, except as otherwise specifically provided in this agreement.

"f. Within 30 days, CTA shall identify and provide a statement of all funds received by CTA on Instituto accounts since February 24, 2017. At that time, CTA shall

pay these amounts to Instituto as an additional payment under this Agreement to be distributed to the appropriate Instituto client.

"g. If CTA receives any additional funds on Instituto accounts, CTA shall immediately, and in no case in less than 10 business days, notify Instituto and, if the contact information is available to CTA, the original judgment creditor. CTA shall, within 30 days of receipt of any such funds, pay the funds to Instituto and, if the contact information is available to CTA, the original judgment creditor. CTA shall, within 30 days of receipt of any such funds, pay the funds to Instituto on these accounts as an additional payment under this Agreement.

"h. If CTA receives any notice related to any abstract of judgment, lien, or levy initiated by CTA related to an Instituto account, CTA shall immediately, and in no case in less than 10 business days, notify Instituto of the event and provide a copy of any written notice."

"Additional Terms" in the settlement agreement included that the "Court shall retain jurisdiction over the Parties to enforce the provisions of this Agreement or enter judgment pursuant to the terms of the settlement under Code of Civil Procedure section 664.6."

As shown above, the definition of " 'Instituto accounts' " was broad, to include any assignment by Instituto, or by an Instituto client, or subject to the terms of the collection agreement, language intended to encompass any account or judgment that was related to Instituto or its clients. As also shown, the settlement agreement called for CTA to return and reassign Instituto accounts and to cooperate, language that is also broad, and intended to fulfill the overall purpose of the agreement that CTA would no longer have control over Instituto accounts—and not be able to profit from them.

Within months of the settlement agreement, Mark Meyer, one of Instituto's lawyers, was contacted by an attorney involved in a Los Angeles County case based on a judgment in favor of Jose Luis Aguilar, a client of Instituto (the Aguilar case). The attorney asked Meyer if Instituto or Aguilar, claimed a right to an abstract of judgment in the case.

On January 24, Meyer sent an e-mail to Douglas Provencher, attorney for CTA, inquiring about the case, which e-mail said, "It would appear that CTA was undertaking collection activity without informing Instituto or the original judgment creditor and contrary to the testimony or suggestions at depositions and settlement conferences."[3]

Provencher responded by e-mail of January 26, an e-mail that was accompanied by various documents relating to the Aguilar case. The attachments indicated that on January 22, 2018, CTA entered into a settlement of an Instituto account, and had released a debtor's property from an abstract of judgment, in exchange for a promissory note to be paid to Collectronics. The documents also revealed the online docket from the Los Angeles County Superior Court indicating that CTA dismissed its action with prejudice pursuant to a settlement.

Reading all this, Meyer concluded that Aguilar and Instituto would be unable to pursue collection against the real property based upon the abstract of judgment; and without assets in the name of the debtor, Aguilar lost any prospect of collection of the judgment.

By an e-mail later that day, Meyer requested that Provencher provide additional information. No such information was forthcoming, and Meyer sent a follow-up e-mail on January 31. Still, no information was provided.

On February 6, via counsel, Instituto sent a "Notice of Breach of Settlement Agreement." The notice spent several paragraphs discussing the Aguilar account, and among other things stated as follows:

"Under the Settlement Agreement, CTA ceased to have any ability to collect on these accounts as of January 2, 2018 because the collection agreement was terminated and CTA was to execute all appropriate documents assigning 'any accounts, cases, or

[3] In a March 31, 2017 deposition, Looney testified there were no continued efforts to collect on retained Instituto accounts. He claimed to have provided all relevant documents. And during litigation and settlement, Looney represented that, subject to a few exceptions, CTA had ceased all collection activity on Instituto accounts.

judgments arising from or related to Instituto accounts, back to the original judgment creditor or such other person as Instituto may direct.'

"In fact, the matter of *Aguilar v. Rojas/Highway Specialty* is an account that CTA represented it was not retaining as of January 2014. This is reflected in relevant 'inventories,' reassigned documents, and Mr. Gary Looney's deposition testimony. [Citation.]

"CTA agreed that CTA shall not retain any Instituto accounts, CTA would return or reassign all accounts, CTA would notify Instituto of any notice related to any abstract of judgment, lien, or levy initiated by CTA related to an Instituto account, and that CTA would cooperate in carrying out the intent of the Settlement Agreement.

"After execution of the Settlement Agreement, Gary Looney breached both the express obligations under the agreement and the covenant of good faith by knowingly concealing his active participation in litigation and negotiating and entering into a settlement that compromises the rights of an Instituto client.

"Specifically, Gary Looney actively negotiated and entered into an oral or written agreement for the release of an abstract of judgment in exchange for a promissory note to pay Collectronics, Inc. $50,000 within 5 years, upon additional terms."

The notice of breach ended with this demand:

"Although Instituto considers elements of this breach to be non-curable, Instituto elects to provide this Notice of Default and demands that CTA cure this default within 10 days by:

"1. Identifying each account on which there is any known outstanding lien, abstract, litigation, or other relevant proceeding or condition.

"2. Providing a copy of the entire file for each account on which there is any pending proceeding or litigation activity, including the *Aguilar v. Rojas/Highway Specialty* file, including any documents that are in the 'possession' of CTA's currently retained collection counsel.

"3. Paying the full amount of the underlying judgment ($40,946.02) plus interest from 12/19/2008 to present in the Aguilar matter without any deduction for costs, fees,

expenses, commission, or any other deduction that CTA may have been able to claim under the now-terminated 2005 collection agreement.

"Unless the default is cured in accordance with the above proposal, Instituto shall retain its rights to file a motion to enforce the Settlement Agreement or file an independent action for the enforcement of the Settlement agreement, and seek all attorney fees and costs associated with enforcing the Settlement Agreement."

Nothing was forthcoming from CTA.

The Motion

On May 1, Instituto filed a motion to enforce the settlement agreement, set for hearing on June 15. The motion was accompanied by declarations of Meyer and Shaker, both of which attached numerous exhibits supporting Instituto's position, 17 exhibits in the case of Meyer, 11 from Shaker. The motion sought three items from the court: (1) order CTA to pay the judgment in the Aguilar case; (2) "order CTA to cease collection activity and identify all collection activity on Instituto accounts"; and (3) attorney fees. A proposed order accompanied the motion, an order, we note, that bears remarkable similarity to the order ultimately issued by Judge Cheng here.

On May 2, CTA filed its own motion, entitled "Motion to Determine Defendants Are in Compliance" with the settlement agreement, also set for June 15. CTA's motion urged that "all of the issues" are resolved "except the dispute over the Aguilar case." CTA's motion set forth its claimed history of the case, the settlement, and what CTA claimed were the "alleged breaches."

On June 4, CTA filed what it called its "response" to Instituto's motion. The response was all of four pages, two of which purported to discuss the "Aguilar case." Noteworthy is that in its response CTA at no point argued, or even urged, that the relief Instituto sought—as reflected, for example, in its motion and its proposed order—was in any way beyond the relief the trial court could provide.

The motions came on for hearing as scheduled, on June 15, before Judge Cheng, at the conclusion of which he ordered the parties to provide proposed orders. They did,

Instituto providing its proposed order on June 20, a proposed order to which CTA did not object as beyond the trial court's jurisdiction.

Perhaps even more significantly, CTA's own proposed order urged that the court's order include a 17-line paragraph that begins as follows: "IT IS ORDERED that Creditors Trade Association, Inc. and the Instituto Laboral de la Raza shall obtain joint written instructions from Jose Luis Agular [*sic*]. These joint written instructions from Jose Luis Aguilar shall be filed with this Court." The lengthy paragraph goes on in detail as to what is the claimed "evidence" supposedly supporting CTA's request. And among other things, CTA's proposed order sought that the joint instructions to be issued by the court reflect the following:

"(1) state what Mr. Aguilar wants to do with the $50,000 Promissory Note secured by a Deed of Trust against real property in Southern California that CTA obtained in January 2018;

"(2) who does Mr. Aguilar want to pursue the judgments he has against Highway Specialty and/or Jose Rojas including renewing the judgments, filing any claim in Jose Rojas' probate, if there is a probate; preserving any rights Mr. Aguilar may have under the judgments, and

"(3) if he will sell all of his rights in the Promissory Note and Deed of Trust to Creditors Trade Association, Inc. or its nominee for $50,000."

On June 28, Judge Cheng entered his order finding in favor of Instituto's position, which order provided in its substantive entirety as follows:

"Having considered the pleadings, evidence, and arguments of counsel, the Court grants plaintiff's motion to enforce the settlement agreement.

"The court finds that CTA breached the Settlement Agreement (dated January 2, 2018) by continuing collection activity and settling an Instituto account after the Settlement Agreement had been signed. The Court finds that CTA did not provide any notice to Instituto or its client Jose Luis Aguilar.

"The court orders CTA to cease all collection or litigation activity on any judgment related to Instituto or its clients, including every account listed in the 'Client

Inventory' documents created by CTA related to Instituto Laboral De La Raza, including Exhibits 10a, 10b, 10c, and 10d to the Declaration of Sarah Shaker, and including the account of Aguilar/Highway Specialty/Rojas.

"Within thirty days of this order, in a statement under penalty of perjury, CTA shall identify—by file number, account name, debtor name, court, court case number, court case name, and judgment date and amount—all judgments, accounts, or cases in which any pending litigation or collection activity has taken place since February 2017 in any way related to or arising out of any account listed on any of the Client Inventories, and set forth a detailed statement of all collection or litigation activity related to each account, including all pleadings, receipt of funds or any other thing of value, all settlements, or any other activity or transactions.

"Within thirty days of this order, Instituto and CTA shall meet and confer regarding each account identified by CTA in which collection activity has taken place since February 2017; and the parties shall cooperate in carrying out the intent of the Settlement Agreement, including sharing all relevant information and documents.

"CTA shall make the remaining payments, totaling $250,000, in three installments of $83,333.33 on or before August 2, 2019, in accord with the Settlement Agreement.

"The parties must abide by the duties and obligations enumerated in the Settlement Agreement.

"CTA shall pay **$79,816.69** to Instituto no later than **July 27, 2018**, which shall be provided by Instituto to its client Jose Luis Aguilar.

"CTA shall pay to Losch & Ehrlich the amount of **$15,000** for fees and costs incurred in connection with the motions."

On July 17, CTA filed an appeal of that order.

DISCUSSION

CTA's Appeal Has No Merit

CTA's introduction says that its appeal "challenges two parts" of Judge Cheng's order. And CTA's "Issues Presented" lists those two parts, that "CTA appeals from two commandments of the *Order* imposing terms that were not included in the Settlement

Agreement. [¶] (A) that CTA execute, under *penalty of perjury*, a statement identifying various accounts in which collection activity has taken place since February 2017 and a detailed summary of any activity on such accounts; and [¶] (B) that CTA pay $79,816.69 to [Instituto], which shall be provided by Instituto to Jose Luis Aguilar."

CTA's argument fails, both procedurally and substantively.

As to the procedural, such argument was not made below, not in CTA's response to Instituto's motion, not at the hearing. The argument has no place here.

As the leading appellate treatise puts it, "As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal; and it also reflects principles of *estoppel* and *waiver*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 8:229, p. 8-174.) The author cites numerous cases in support, including two from this court: *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767; and *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

Instituto's respondent's brief devotes several pages to the argument that CTA is foreclosed from asserting its position here, on the basis that CTA did not assert the position below. CTA's reply brief does not even mention, much less reply to, Instituto's argument, which is hardly effective advocacy.

Not only does the principle apply here, so does the fundamental reason for the principle—"fairness." As to that, had the issue of the scope of the settlement agreement been properly raised in the trial court, Instituto would have had the opportunity to present arguments, and, if necessary, extrinsic evidence, as to the meaning and context of the agreement. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

Indeed, not only did CTA not assert below that the relief requested by Instituto exceeded the terms of the settlement agreement, its own proposed order would have directed the parties to "obtain joint written instructions from Jose Luis Aguilar" as to who he wants to pursue collection. That, of course, goes far beyond anything within the

express terms of the settlement agreement to manage interactions between Instituto and its client. And it recognizes that the court had the authority to fashion this kind of equitable relief as it did. In sum, CTA's appeal is defeated by the settled principle discussed above.

Moreover, the argument would have failed on the merits, under the law pertaining to section 664.6. Put otherwise, Judge Cheng had the authority to issue the order he did, as the leading practice treatise describes:

"The [Code of Civil Procedure section] 664.6 procedure empowers the judge hearing the motion to determine *disputed factual issues* that have arisen regarding the settlement agreement. . . . [*Fiore v. Alvord* (1985) 182 [Cal.App.3d] 561, 566 . . . — statute's express authorization for trial courts to determine if a settlement occurred is 'implicit authorization' for trial court to determine settlement's terms and conditions]

"a. [12:978] **Application**: Thus, a court on a [section] 664.6 motion may adjudicate such matters as: [¶] . . . [¶]

"• [12:978.2] Whether the settlement was intended to cover certain offsets and credits. [*Fiore v. Alvord*, supra]

"• [12:978.3] Whether one settling party forfeited *indemnification* rights against the other not expressly mentioned at the time of the settlement. [*Skulnick v. Mackey* (1992) 2 [Cal.App.4th] 884, 889 . . . [¶] . . . [¶]

"• [12:978.5] Where events not under the control of the parties made it impracticable to complete the settlement by the agreed date, the trial court could extend the date set for performance. [*Osumi v. Sutton* (2007) 151 [Cal.App.4th] 1355, 1361 . . . ." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 20114) ¶¶ 12:977–12:978, pp. 12(II)-133 to 12(II)-134.)

In re The Clergy Cases I (2010) 188 Cal.App.4th 1224, 1229 is illustrative. The issue there arose out of a settlement agreement between numerous individuals who had been sexually abused by clergy and a religious corporation. The settlement included a procedure for lodging documents concerning alleged perpetrators, and a determination of what documents would be publicly disclosed. (*Id.* at pp. 1229–1230.) Various third

party clergy challenged the authority of the trial court to engage in this process and order release of documents. The court first held that the "process by which the court enforced the settlement agreement was fair, and the court properly exercised its jurisdiction pursuant to Section 664.6 to decide whether documents in the possession of the Franciscans could be publicly disclosed" (*id.* at pp. 1237–1238), going on to hold that the trial "court had jurisdiction under Section 664.6 to decide what documents could be published and the concomitant power to decide what procedures to use to ensure fair process in the decisionmaking [*sic*]. The court did not have to consider the Civil Discovery Act in enforcing the settlement agreement and could have devised its own procedures, but it was free to adapt discovery act procedures that are familiar and routinely applied by lawyers and courts." (*Ibid.*)

As quoted above, the settlement agreement calls for the sharing of information, identification of accounts and judgments, identification of collections, cooperation in the process of returning all accounts, and the execution of documents for the purposes of accomplishing the purposes of the agreement. Here, as in *In re The Clergy Cases I*, Judge Cheng had the authority to fulfill the purposes of the settlement agreement by adopting procedures to ensure the full identification and cooperation necessary to complete and enforce it.

The second item CTA asserts was beyond Judge Cheng's jurisdiction was his order directing CTA to pay the value of the Aguilar account, the account, it will be recalled, CTA wrongly retained but then settled. As best we can understand it, CTA contends that this exceeded Judge Cheng's authority because the settlement agreement did not expressly provide a remedy for CTA's wrongful settlement of an account to be returned.

As of January 2, 2018, the Aguilar account was an "Instituto account," and thus one required to be returned to Instituto and its client. But CTA did retain the account after the settlement agreement, continued to engage in collection activity, and settled the account—activity, it cannot be gainsaid, that made a "return" of this account a practical nullity. Given the circumstances, it was within Judge Cheng's jurisdiction to establish an

equitable manner of "returning" the account to Instituto and Aguilar. (See *Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050, 1061–1062 [jurisdiction under section 664.6 includes the court's equitable authority].)

Finally, we note what might be called an ancillary argument by CTA on this issue, that the value of $79,816.69 found by Judge Cheng is not supported by substantial evidence. We deem this argument waived, under settled authority well described by Instituto: "In challenging this factual finding, a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, and CTA was required to 'set forth in their brief all the material evidence on the point and *not merely their own evidence*. Unless this is done the error assigned is deemed to be waived.' (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)" CTA has not set forth all relevant evidence in the record, including the reply papers and declarations filed by Instituto. Nor has CTA set forth all the evidence in a manner favorable to the trial court's ruling. By failing to do this, CTA has waived the argument.

DISPOSITION

The order appealed from is affirmed. Instituto shall recover its costs on appeal.

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Richman, J.

We concur:

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Kline, P. J.

_____
Miller, J.

Instituto Laboral De La Raza v. Creditors Trade Association, Inc. (A155099)